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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 642

THE CINCINNATI GAS & ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, THE OHIO FUEL GAS COMPANY, THE DAYTON POWER AND LIGHT COMPANY, AND THE CITY OF LANCASTER, OHIO,
Respondents.

BRIEF OF THE OHIO FUEL GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE OPINIONS BELOW

The Petition seeks review of a Judgment of the Court of Appeals filed June 20, 1957, based on an opinion filed on that day (Petition p. 1a). In dismissing Petitioner's appeal, the opinion states that this proceeding, being in all respects identical with *Cincinnati Gas & Electric Co.* v. *Federal Power Commission,* 100 U. S. App. D. C. , 246 F. 2d 688, is controlled by the prior opinion, filed June 3, 1957. In such prior proceeding, Petitioner unsuccessfully appealed from a decision of the Commission involving the rate form under which Petitioner purchased gas from Central Kentucky Natural Gas Company. (Petition, pp. 2a to 14a). No petition for writ of certiorari has been filed with this Honorable Court to review the decision of June 3, 1957 in said Central Kentucky case.

STATEMENT OF THE CASE

With most of the Petitioner's narrative under this heading we have no quarrel. However, it should be pointed out that the Commission proceedings, which began with a suspension order issued October 16, 1953 (R. 989) and eventuated in a final order issued June 29, 1956 (R. 1123) were concerned with the form of rate to be used by Ohio Fuel for its sales of natural gas subject to the Commission's jurisdiction. Most of the evidence related to Ohio Fuel's contention that the pre-existing "average day" rate form*

*The difference between the pre-existing rate form and the contract demand rate form approved by the Commission relates to the method of computing the billing demand to which the demand charge in the two-part demand-commodity rate is applied. The billing demand under the pre-existing rate form was the highest average daily delivery during any month of the prior twelve months. Billing demands varied depending upon the actual usage which in turn reflected the fluctuations in winter temperatures. Under the contract demand rate form, the billing demand is the highest single day's delivery

was in fact unjust and unreasonable. The Order of June 29, 1956, after specifically finding that to be the fact, (Petition, p. 19a), ordered, pursuant to Section 5 of the Natural Gas Act, that the "contract demand" rate should be made effective for the future, i.e., after the date of that Order (Petition, pp. 19a-20a).

Petitioner's present contentions are made without substantial evidentiary support. In the Hearing before an Examiner of the Commission, Petitioner's evidence was calculated to support an average day rate form (R. 378). After the case was submitted to the Examiner, Petitioner changed its position and advocated a "short term contract demand" rate form. It was not until after this change of position that it also advanced its arguments based on *Market Street Railway Company* v. *Railroad Commission of California*, 324 U. S. 548; and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, and *Sierra Pacific Power Co.* v. *F. P. C.* 350 U. S. 348, the primary points asserted by Petitioner before the Court of Appeals and in its petition herein.

The first citation to the record at which Petitioner claims to have made its present contentions (Petition, p. 7), is its Application for Rehearing to the Commission; those contentions were thoroughly considered and rejected (Petition, p. 20a, et seq.).

In its Order of June 29, 1956, the Commission referred to its Order of May 11, 1956, at its Docket No. G-2451 (e.g. Petition, p. 17a). The Court's Opinion issued June 3, 1957 (Petition, pp. 2a-14a), dismissed this Petitioner's attempt to review the Commission's Order of May 11, 1956.

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during the twelve months period ending with the current billing month but in no event less than 90% of the contract quantity which seller is obligated to deliver and in no event more than such contract quantity. The contract quantity is determined by negotiation between the parties and continues for the contract term, subject to certain rights of the buyer to reduce the contract quantity during the term of the contract.

Thus, both the Court of Appeals and the Commission relied upon their previous orders in the earlier case; Petitioner's contentions concerning the specific responses of the Commission to its various arguments must, therefore, be examined by reference not only to the order, in this case, but to those issued in the other case as well. The Court's Opinion of June 3, 1957 contains a sufficient reference to and quotation from the earlier Commission order to demonstrate the complete lack of merit in Petitioner's complaints, even assuming it has standing as an "aggrieved party" to assert them.

We have restated Petitioner's first reason to reflect the issue as it is presented by the facts in this case.

REASONS FOR DENYING THE WRIT

1. Under the circumstances of this case, a decision that Petitioner is not aggrieved properly precludes consideration of formal procedural objections to the Commission's orders.

The first reason advanced in support of the Petition herein is the contention that the Court of Appeals avoided consideration of Petitioner's procedural objections. Such procedural objections are to the effect that the Commission failed to comply with Section 8(b) of the Administrative Procedure Act in that it did not separately answer Petitioner's argument based on *Market Street Railway*, *supra*, and that it did not adequately answer Petitioner's argument based on *Mobile* and *Sierra Pacific*, both *supra*.

Petitioner's sole interest herein is its objection to the long term commitment feature of Ohio Fuel's contract demand rate form (Petition, p. 7, p. 6a). All of its other objections, including those based on *Market Street Railway*, *supra*, and on *Mobile* and *Sierra Pacific*, both *supra*, are subsidiary to, and pertinent only insofar as they support, that basic position. That the Commission has fully con-

sidered Petitioner's basic objection to the long term commitment feature of the contract demand rate form is abundantly clear from the quotations contained in the Court of Appeals' Opinion of June 3, 1957 (especially p. 4a et seq. of the Petition), and the Commission's Order on Rehearing (Petition, p. 20a). Petitioner cannot fail to know what disposition was made of its claims and the reasons given. (See footnote 5, Petition, p. 21a).

Apparently Petitioner would have it that a party who has no standing to seek review of an administrative order is, nevertheless, entitled to that review. (e.g., Petition, p. 13). Though the Petition lacks any contention, under its first reason, that Petitioner is in *fact* "aggrieved" (save for a bald assertion at page 14 that the result is a "grevious wrong to Petitioner"), it nevertheless seems to insist that it deserves a full consideration of all its contentions on the "merits". (As pointed out under point 2, below, Petitioner's contentions received full consideration on the merits by the Court).

This Court has thoroughly disposed of this sort of claim in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492. There the petitioner lacked standing to seek review of part of a Commission order because it had not applied to the Commission for a rehearing on that part. It was asserted, as it is here (Petition, pp. 12-13) that the Administrative Procedure Act requires review despite failure to qualify under the Natural Gas Act, but the Court held at page 500 of 348 U.S.: "It is not a reasonable interpretation of the general terms of that Act to hold that they repeal the administrative procedures specifically set forth in the Natural Gas Act." To the same effect is *Magnolia Petroleum Co.* v. *Federal Power Commission*, (C. A. 5) 236 F. 2d 785, 793.

Furthermore, the Administrative Procedure Act provides in Section 10(e) (quoted in the Petition at page 5) that "due account shall be taken of the rule of prejudicial

error." A party that is not "aggrieved" has not been subjected to "prejudicial error". cf. *Kansas City Power & Light Company, et al.* v. *McKay*, C. A. D. C. 96 U. S. App. D. C. 273, 225 F. 2d 924.

Thus, if Petitioner is not aggrieved, as the Court found, the Court of Appeals is not required to consider Petitioner's procedural claims, and the first "Question" presented (Petition, page 2) does not constitute a reason why the petition for writ of certiorari should be granted.

2. The Court of Appeals correctly decided that Petitioner was not aggrieved by the Commission's Order and that its three substantive claims were not, in any event, well taken.

Petitioner seems to say that it is presently aggrieved because it must now enter into a long term commitment, the consequences of which may, but need not, be deleterious to Petitioner. Petitioner's position rests solely on argument. The record contains no expert testimony or other evidence to support it (as the Court found, Petition, p. 9a).

In this case after a thorough investigation (there were 37 days of hearing and well over 100 exhibits and "items" of documentary evidence), the Commission determined to base its decision concerning rate form on present facts, and to reserve for possible future consideration, in the exercise of its admitted continuing jurisdiction, contentions which were based at best upon speculation as to what might possibly happen in the future. The Petitioner has not raised any issue before the Commission or the Court below that the decision with respect to present facts was erroneous. Its sole claim of aggrievement was based on possible events which might occur in the future. The Court found that such possibilities did not give the Petitioner the status of an aggrieved party.

Nevertheless, we shall examine Petitioner's separate contentions.

(i) The Market Street Railway case.

Both the Court (Petition, pages 7a-11a) and the Commission (Petition, pages 4a-5a and 20a) thoroughly considered the applicability of this case. The natural gas industry, as the entire record amply shows (e.g. Petition, p. 17a) is a dynamic and rapidly growing one. Whether it will ever become a "generally sick industry" (324 U. S. 548—Petition, p. 8a) cannot now be told. Petitioner's evidence was that it is a healthy and expanding business (Petition, p. 9a, R. 295-297, 304). Values connected with it have certainly not "been lost by operation of economic forces" (Petition, p. 15). These are questions of *fact*.

Petitioner's complaint is against the Commission's order as it relates to *rate form;* such decision does not preclude the Commission, now or in the future, from applying the concept of the Market Street case in determining the level of Ohio Fuel's rates.

There was no basis on the record, nor is there any in law, to require reversal of the Commission's determination that Petitioner's presently unfounded apprehensions should not control the result. Thus, the Court's holding that presently groundless fears do not constitute aggrievement is eminently proper. *Eccles* v. *Peoples Bank,* 333 U. S. 426, 432.

(ii) "Mobile" and "Sierra Pacific"

At the outset it must be noted that Petitioner is here urging an inconsistent position. It says that the Commission did not make adequate findings under the *Sierra Pacific* case to set aside its contract. The contract it alleges constitutes the general terms and conditions attached to

the former rate schedule which contained the average day rate form. Petitioner does not support that rate form. It agrees with the Commission that such form is unjust and unreasonable (Petition, p. 11). It wants a different rate form, to wit, a "short term contract demand" (See Petition, p. 6a), to which the old general terms and conditions would simply not be applicable. (See R. 952-968, especially R. 963-965.) Thus, Petitioner is not relying on the contract, but at the same time it condemns the Commission for allegedly failing to make the proper findings to set it aside. This is a clear demonstration that the Petitioner is not aggrieved.

Even assuming that this contention can be consistently asserted, the record is against Petitioner. (See the Commission's opinion of June 29, 1956 (Petition, pp. 14a-16a, 18a, 19a), its Order on Rehearing (Petition, p. 21a) and the Court's Opinion (Petition, pp. 11a-13a)). The Commission's "findings" (which are findings of *fact*) came after two and one-half years of consideration. There were 37 days of hearings, most of which, as previously stated, were devoted to taking evidence relating to the reasonableness of the previously prescribed rate forms. As the Examiner stated (R. 1026), "The present Ohio Fuel attack is beamed primarily at the rate form aspects of Opinion 273." (which had prescribed the "average-day" rate—see the Commission's Opinion in this case at Petition, p. 16a). The finding of paramount public interest is certainly sustained by the evidence, as both Commission and Court found. The Petition does not challenge the sufficiency of that evidence.

Petitioner's complaint against the possible future effect of "unilateral rewriting of contractual rights effective in the future" because of present factual necessity, is purely a formal one; it "comes down, on the record, to nothing more than the bare possibility of some injury in the future". *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, 305. He who

asserts it is not "aggrieved" in the absence of a showing of "substantial and more immediate harm." (id.)

Petitioner seems to complain (Petition, p. 11) that the findings in the Order of June 29, 1956 came in response to contentions urged by another party, but there is no assertion that they are not equally applicable to Petitioner's claims (see Note 4; Petition, p. 18a). No such assertion could be made because both contracts, that of Petitioner and that of the other party, were in the record. At any rate, specific attention was given to these matters in the Order overruling the Application for Rehearing (Petition, p. 21a).

Petitioner also asserts (Petition, p. 17) that the Court went further than the Commission had gone and determined that Petitioner's contract with Ohio Fuel "contemplated" future changes. On this point Petitioner directs this Court's attention to a decision of the United States Court of Appeals for the District of Columbia Circuit in *Memphis Light, Gas and Water Division* v. *Federal Power Commission*, issued November 21, 1957, with which decision, however, Petitioner does not agree (Petition p. 8) since it asserts that the rate level (Petition p. 17) and certain aspects of the rate form (Petition pp. 8, 11, 6a) may be changed.

It may be that on the limited point as to the "contemplation of future filings" the decision in this case does not square with that in the *Memphis* case, decided by the same Court on a far different record, Judge Bastian joining in both opinions. That point is, however, not decisive of this case, not only because, as finally found, Petitioner is not aggrieved, but because here the Commission conducted a full and exhaustive inquiry into the reasonableness of the previous rate and found, as authorized by the *Sierra Pacific* decision, that its continued use "is no longer in the public interest" (Petition, p. 16a).

(iii) Petitioner's Electric Business.

Again, the point is purely speculative. In making it, Petitioner can say only "in the event of a loss of gas markets * * *" certain consequences might occur. (Petition, p. 18). But there is no contention that such a loss is inevitable or even likely, or that such consequences would follow from such loss. *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 431.

Both the Commission (Petition, p. 20a) and the Court (Petition, p. 10a-11a) dealt thoroughly with the contention and found against it on the *facts*. The only authority which Petitioner cites has to do with the allocation of costs. When the rates at which Petitioner sells its products are fixed, a proper allocation of its costs would be necessary to be sure that its electric customers do not pay the costs of its gas operations and vice versa. That is not a matter of concern in this case.

(iv) No Public Question is Involved.

Since, as the Court of Appeals has correctly determined, the adverse effect of the decision complained of upon Petitioner is not sufficient to entitle it to appeal as a person "aggrieved", it is difficult to see how that decision could have any effect upon others not parties to this proceeding.

Disappointed litigants have frequently failed in efforts to review administrative determinations because the record has shown they were not aggrieved. *United Gas Pipe Line Co.* v. *Federal Power Commission*, (C. A. 5), 203 F. 2d 78; *Woodmen of the World Life Insurance Society* v. *Federal Communications Commission*, 70 U. S. App. D. C. 196, 105 F. 2d 75; *Home Gas Company* v. *Federal Power Commission*, 97 U. S. App. D. C. 300, 231 F. 2d 253, 256-7; and *Dayton Power & Light Company* v. *Federal Power Commission*, (C. A. D. C.) 246 F. 2d 694.

Petitioner's lack of standing in this case cannot deprive any of the "hundreds of gas distributing companies throughout the United States" of whatever relief the facts in proceedings to which they are parties may justify.

CONCLUSION

For the reasons set out herein, it is respectfully urged that the Petition does not exhibit special and important reasons why, in the exercise of a sound judicial discretion, the writ of certiorari should be granted. All questions of Federal law sought to be raised have been decided in previous cases, and the decision of the Court of Appeals is in no way in conflict with applicable decisions of this Court. The first Question has been answered many times; the second, at most, would require this Court to "review evidence and discuss specific facts", *United States* v. *Johnston*, 268 U. S. 220, 227.

Dated: December 26, 1957

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John P. Randolph, one of the attorneys for The Ohio Fuel Gas Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of December, 1957, I served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on Petitioner and the other respondents, by mailing a copy thereof, with air mail postage prepaid, to each of the following at the respective addresses shown.

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